

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MIKE D. MEHL</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>CENTRAL DETROIT DIESEL</b>	)	
Respondent	)	Docket No. 1,032,002
	)	
AND	)	
	)	
<b>UNIVERSAL UNDERWRITERS</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (respondent) request review of the May 22, 2007 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

The Administrative Law Judge (ALJ) entered the following Order following a remand from the Board:

That [sic] claimant clearly established that he sustained a traumatic accidental injury on October 17, 2006. Further, that he continued to work, performing manual labor, until October 27, 2006, his last day of hands on training in Topeka. The claimant testified that his symptoms continued to worsen through this period of time, until he could no longer perform his work. The claimant sought medical treatment on Monday, October 30, 2006 and notified his employer that he had sustained a work related injury.

This court finds that the claimant sustained a series of injuries up through October 27, 2006. Therefore, claimant's date of accident will be October 27, 2006. Notice was timely, given on October 30, 2006 to Mr. Brown.<sup>1</sup>

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<sup>1</sup> ALJ's Order (May 22, 2007).

Accordingly, the ALJ went on to order the respondent to pay for the claimant's medical treatment until he reaches maximum medical improvement or becomes re-employed whichever comes first.

The respondent requests review of three issues. First, respondent disputes whether the claimant established that he sustained personal injury on October 17, 2006 and in a series of accidents thereafter until October 27, 2006. Second, respondent disputes that claimant's alleged injury arose out of and in the course of his employment. Third, whether claimant provided timely notice of his alleged accidental injury. Distilled to its essence, respondent maintains that at best, claimant established that he sustained a single, acute injury on October 17, 2006 and that he failed to provide timely notice of that accident. Thus, the ALJ erred in granting claimant benefits.

Claimant argues the Order should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second time this claim has come before the Board. Following an earlier preliminary hearing, the ALJ granted claimant's request for benefits, finding he established a compensable claim, thereby denying respondent's claim that claimant failed to provide timely notice of his claim. The ALJ's Order failed to include any finding with respect to the date of accident and failed to address the recent amendment to K.S.A. 44-508(d). As a result, it was impossible to know if the ALJ properly determined the notice issue. Accordingly, this matter was remanded to the ALJ for further proceedings solely on the issue of claimant's date of accident including whether claimant suffered injury on a single date and/or over a series of dates.<sup>2</sup>

The ALJ took this matter under advisement and with no further evidence offered, issued another preliminary hearing Order, again granting claimant's request for benefits. But as directed, the ALJ specifically found that claimant not only sustained a single, acute injury on October 17, 2006 but also a series of accidents from that date and up to October 27, 2006. She also found that claimant provided notice on October 30, 2006 when he contacted Mr. Brown.

In spite of the Board's very specific directive, the respondent seems to want to relitigate all the same issues and not just the date of accident(s) and the corresponding timeliness of notice. Without additional evidence, there is no reason to revisit the issue of whether claimant's alleged injury arose out of and in the course of his employment. As in

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<sup>2</sup> Board Order (May 2, 2007) at 5.

the earlier preliminary hearing, claimant's testimony as to the accident is uncontroverted. Thus, that issue is again affirmed.

The remaining issue, the date of accident and the timeliness of notice, warrants further discussion. As noted in the earlier appeal, the parties failed to address the applicability of newly amended K.S.A. 44-508(d). A claimant's date of accident is now determined by statute rather than by case law. The new date of accident determination is as follows:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

In the earlier preliminary hearing Order, the ALJ did not make any determination of the date of accident or even whether claimant had sustained his burden as to a single, acute accident or to a series of accidents, invoking the principles set forth in the newly amended statute. Thus, it was impossible to determine if the ALJ's conclusion as to the timeliness of claimant's notice was appropriate. For that reason, the claim was remanded to the ALJ for further proceedings.

As requested, the ALJ concluded that claimant sustained a series of accidents, culminating on October 27, 2006, his last date worked. In explaining her finding, she noted that claimant continued to work performing manual labor after October 17, 2006, the date he originally was injured and that he further testified that his symptoms continued until he sought medical treatment on October 30, 2006. Thus, she was persuaded that claimant had established a series of accidents culminating on the legally-determined accident on October 27, 2006. After considering the record as a whole, this Board Member agrees with the ALJ's conclusion and affirms this finding. Respondent's contention that "there is

absolutely no evidence in the record that claimant suffered other 'events' or 'microtraumas' after October 17, 2006" is disingenuous.<sup>3</sup> Claimant testified that while he attended a training session that week before October 27, 2006, his symptoms worsened and over time, his shoulder became stiff.

The ALJ went on to conclude claimant's notification to Mr. Brown on October 30, 2006, was sufficient under K.S.A. 44-520. Although respondent portrays claimant's conversation with Mr. Brown on October 30, 2006 as too vague so as to satisfy the statute's requirements, this Board Member disagrees. Claimant testified that he told Jim Brown, the plant manager on October 30, 2006 that he had sustained a work-related injury.<sup>4</sup> Mr. Brown acknowledges notice of *an* injury, but denies claimant told him this was work-related. The ALJ was persuaded by claimant's testimony and this Board Member agrees with that conclusion. Thus, claimant provided timely notice as required by K.S.A. 44-520 and the ALJ's preliminary hearing Order on that issue is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>5</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated May 22, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2007.

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
Kurt W. Ratzlaff, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge

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<sup>3</sup> Respondent's Brief at 3 (filed June 25, 2007).

<sup>4</sup> Claimant's Depo. at 23.

<sup>5</sup> K.S.A. 44-534a.